APPEAL NO. 012356
FILED JULY 3, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 7, 2002. The hearing officer determined that (1) the respondent (claimant) sustained a compensable injury in the form of an occupational disease; (2) the date of injury, pursuant to Section 408.007, is _____; (3) the appellant (carrier) is not relieved from liability under Section 409.002 because the claimant had good cause under Section 409.002 for failing to timely notify her employer in conformity with Section 409.001; (4) the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and (5) the claimant had disability beginning September 25, 2001, and continuing through the date of the hearing. The carrier appeals the injury, notice, election, and disability determinations on sufficiency of the evidence grounds. The claimant urges affirmance. The hearing officer's date of injury determination was not appealed and is, therefore, final. Section 410.169.

DECISION

Affirmed.

INJURY AND DISABILITY

The hearing officer did not err in determining that the claimant sustained a compensable injury and had disability from _____, through the date of the hearing. These were questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

NOTICE

The hearing officer did not err in determining that the carrier is not relieved from liability under Section 409.002 because the claimant had good cause for failing to timely notify her employer of the injury. The carrier disputes that the claimant established good cause and asserts that the hearing officer failed to apply the proper standard. The test for good cause is that of ordinary prudence; that is, whether the employee has prosecuted his or her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). Whether good cause exists in

a particular case is a question of fact for the hearing officer to decide (Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993), and a claimant's conduct must be examined in its totality to determine whether the test of ordinary prudence was met (Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993). In view of the evidence presented, the hearing officer could find, as he did, that the claimant trivialized her injury until she later began to experience more severe symptoms after a change in job duties. The hearing officer did not abuse his discretion in determining that the claimant had good cause for failing to provide timely notice of the injury to her employer.

ELECTION OF REMEDIES

The hearing officer did not err in determining that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy. We note that the Court of Appeals for the Fifth District of Texas at Dallas in Valley Forge Ins. Co. v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, no pet. h.), held that the common-law election of remedies doctrine is no longer a viable affirmative defense to the pursuit of a workers' compensation claim. *See also* Texas Workers' Compensation Commission Appeal No. 012964, decided January 14, 2002, citing the Austin case. Additionally, the hearing officer's determination that the claimant did not make an informed election to receive health insurance benefits in lieu of workers' compensation benefits is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **FEDERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202-2812.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge